SUPREME COURT, U. S.
FILED
AUG 8
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-2020

REGINALD LEWIS,

Petitioner,

against

HUDSON WATERWAYS CORPORATION,

Respondent.

BRIEF OF RESPONDENT HUDSON WATERWAYS CORPORATION IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, N. Y. 10004.

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Opinions Below

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Second Circuit is reported at 495 F.2d 604.

Jurisdiction

The jurisdiction of this court has been invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

In order to reach the questions presented in the petition, it is necessary to assume facts which are contrary to the record in this case. They are (1) that there is no reason in the record for setting aside a verdict and granting a new trial even though (a) the trial judge specifically reserved further argument as to the sufficiency of the evidence, until after the return of the jury verdict and (b) sufficiency of the evidence was one of the reasons urged in the motion papers; and (2) that Section 642 of Title 46 U.S. Code applies even though it is undisputed that the respondent paid in full and did not deduct anything from the amount stated to be due according to the wage voucher.

Statement of the Case

On April 15, 1967 petitioner, a seaman, was discharged from the service of the SS TRANSORLEANS, a vessel owned by respondent, for medical attention. The discharge took place at Balboa, Canal Zone when the vessel arrived at that port prior to transiting the Panama Canal en route to its final port of discharge at Houston, Texas.

In conjunction with petitioner's discharge, the vessel's master prepared a wage voucher (Exh. 2). This voucher showed a balance of $3,965.69 to be due. It consisted of wages for the period January 11, 1967 to April 15, 1967 together with overtime totaling 798 hours and board and lodging less certain allowable deductions.

Since the ship's Master did not have sufficient cash available and April 15, being a Saturday, and the agent at Balboa was unwilling to advance the funds or telex New York because he did not wish to delay the vessel, the voucher was accepted by the petitioner for payment on presentation to the paymaster at New York.

As the Court of Appeals has noted prior to leaving the vessel at Balboa, according to the vessel's Master petitioner advised the Master that he might have his friend, the Chief Engineer Molnar collect the balance shown on the voucher to be due at the final port of discharge. The Master further testified that if petitioner elected to do this no payment would be made without a written assignment to the Chief Engineer.

Petitioner's uncertainty as to his plans stemmed from the fact that he was a Jamaican citizen who was residing in the United States under a visitor's visa and therefore was not sure whether he would be allowed to enter the United States to collect his wages.

Two days after his discharge petitioner presented a voucher to the paymaster in New York City. The paymaster informed the petitioner that he could not honor the voucher until he received instructions from the vessel. On April 19 the vessel arrived in Houston. On April 20, after contacting the vessel, the paymaster informed the petitioner that the ship had paid the monies to the Chief Engineer Molnar. Though on the trial petitioner claimed that he never made an assignment and that it was always his intention to receive personal payment in New York, he made no protest when he was advised that the money had been paid to the Chief Engineer. Instead he took the telephone number of the hotel where the Chief Engineer was staying and subsequently telephoned the Chief Engineer. According to petitioner Molnar telegraphed $3,000.00 to him but retained $965.69 as a commission for having procured petitioner his job.

Furthermore even though petitioner received only $3,000.00 from Molnar on April 21, 1967 he took no steps so to advise the respondent. Instead some two months later his attorneys advised by letter that they had been retained by the petitioner to prosecute his claim for injuries and for wages due and liquidated damages pursuant

to the provisions of 46 USCA Section 596 and 597 by reason of the withholding of wages from him (Exh. 4, *infra*, p. 13).

Subsequently suit was commenced and during pre-trial discovery, respondent learned for the first time that petitioner denied that he executed the assignment and that he had been bedridden when the ship's records showed that he had been working overtime. While petitioner admitted that he did not work overtime at the times indicated he contended that he worked the total hours recorded.

On the trial petitioner was unable to indicate when the overtime hours credited to him while he was bedridden were worked. Furthermore other than his own denial he offered no proof to dispute respondent's handwriting expert that the signature on the assignment was that of the petitioner.

On the trial as well as in its petition, petitioner concedes that the shipowner paid and the Chief Engineer in fact received the entire amount of $3,965.69 stated to be due according to the voucher (Petition p. 6). Petitioner however urges that because the respondent elected to stand on the assignment and contest in good faith its liability to pay the $965.69 a second time the refusal to pay again is somehow converted into a deduction within the meaning of Section 642 of Title 46 USC.

The petition also disregards the record and seeks review on issues which do not exist in this case. It asserts that on the first trial the trial judge set aside a jury verdict after a trial in all respects properly conducted and for no reason appearing in the record and that the trial judge set aside his own directed verdict for no reason without written application therefor.

On respondent's motion for a directed verdict at the end of the entire case, the trial court stated:

> "I am going to let it go to the jury. I will hear what you have to say afterwards on that. I have a real

question in my mind as to the wages, the wage part of it, but I can't see from the evidence that this was arbitrary action on the part of the steamship company, but I am going to let it go to the jury and see what they say." (Doc. 23, Minutes of First Trial, p. 7).*

In ruling on the requests to charge prior to the submission of the case to the jury, the trial judge refused to charge the jury that if they found that petitioner authorized the Chief Engineer to receive the wages he could not recover any part thereof (114a-115a).

Following its charge to the jury the trial court overruled respondent's exception to the charge that to constitute sufficient cause it is not necessary that the reason for withholding be based on some legal ground. (*Infra*, p. 14).

While the trial judge in the course of the colloquy which took place prior to the submission of the case to the jury did state that he "would direct a verdict for $965" and that it "will so rule" it responded to petitioner's counsel's statement that "In other words, I assume that I will get a directed verdict for the $965" with a "No". (Doc. 23, Minutes of First Trial, p. 13).

Following the return of the jury verdict, the trial court withheld entry of judgment on the verdict until further order of the Court (169a) and granted respondent leave to move with respect to the verdict on written motion papers.

In its motion papers respondent moved for judgment notwithstanding the verdict or in the alternative for a new trial. One of the grounds for the new trial was that the verdict was against the weight of the evidence (125a).

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* References are to appendix or record in the Court of Appeals unless otherwise indicated. References followed by the letter "a" are to appendix. References commencing with "Doc." are to the document number and page in the record.

The sufficiency of the evidence was argued in the motion papers which were filed by both parties as well as orally. The trial court did not order a new trial with respect to the $965.59 because respondent said it would have difficulty defending the reasonableness of the withholding as petitioner asserts. No such statement was made. The trial court refused to direct a verdict on the motion because of the assignment and the question whether the sum which petitioner was claiming represented wages actually earned.

ARGUMENT

I

The decisions below were clearly correct.

The Court of Appeals was correct in holding that in accordance with *Portman* v. *American Home Products Corp.*, 201 F.2d 847 (2 Cir. 1953), orders granting or denying motions to set aside verdicts on the grounds that they are against the weight of the evidence and the granting of a new trial are not reviewable.

In *Portman* v. *American Home Products Corp., supra* the Court followed the rule laid down by this Court in *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481, and has been reaffirmed in cases such as *United States* v. *Socony-Vacumm Oil Co.*, 310 U.S. 150, 247, *United States* v. *Johnson*, 327 U.S. 106, 111 and *Cone* v. *West Virginia Pulp and Paper Co.*, 330 U.S. 212, 215, 216.

Petitioner is confused between a motion for a new trial and a judgment notwithstanding the verdict when he urges that the setting aside of a verdict and the granting of a new trial denies him the jury trial guaranteed by the Seventh Amendment of the Constitution. A trial court's reexamination of the facts, on a motion for a new trial is in accordance with the rules of the common law and hence does

not violate the Seventh Amendment. 6A Moore, Federal Practice, 3816 (2d ed. 1973). Cf. *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 251.

Petitioner is in error when he urges that the trial judge must state the reason for setting aside the verdict and ordering a new trial otherwise it must be assumed that the Court acted arbitrarily. There is no rule which requires that on a motion for a new trial the reasons for the order must be specified. In *Gilliland* v. *Lyons,* 278 F.2d 56, 59 (9 Cir. 1960). The Court said:

> "As a general rule, no reasons are required; the grounds for the motion are obtained from those stated in the motion."

See *Cherokee Laboratories, Inc.* v. *Pierson,* 415 F.2d 85, 91 (10 Cir. 1969), *cert. den.* 396 U.S. 1059.

The fact is that the trial court gave its reason when it reserved further argument until after the return of the jury verdict.

In this case, the trial court at all times indicated that foremost in its mind was the sufficiency of the evidence.

Insofar as the alleged direction of the verdict is concerned, the trial court was free to change its mind, if it was so disposed, at any time before the entry of judgment, even without an application. Rule 54 of the Rules of Civil Procedure 28 U.S.C.A. *infra,* p. 12 provides that in multiple claims, such as were before the court, an order or form of decision may be changed at any time before the entry of judgment, unless there is an express determination that there is no just reason for delay and an express direction that judgment be entered on one of the claims. There was no such determination nor express direction on the first trial. In fact the trial judge expressly refused to direct a verdict. Doc. 23, Minutes of First Trial, p. 13).

II

The decision of the Court of Appeals is not in conflict with decisions of other Courts of Appeal.

Petitioner erroneously asserts that the circumstances under which a trial court may set aside a jury verdict has become the subject of "considerable disarray" in the federal courts and refers to Moore on Federal Practice and cites the cases of *Fireman's Fund Insurance Company* v. *Aalco Wrecking Company,* 466 F.2d 179 (8 Cir. 1972); *Lind* v. *Schenley Industries,* 278 F.2d 79 (3 Cir. 1960), and *Berner* v. *Pacific Airlines Ltd.,* 346 F.2d 532 (2 Cir. 1965) as examples thereof.

In 6A Moore, Federal Practice (2d Ed. 1966) Sec. 59.08 [5] at page 3819 it says:

> "The trial judge, exercising a mature and judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts; and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set aside the verdict; otherwise not."

In *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc., supra,* the court stated at page 187:

> "Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice occurred."

Lind v. *Schenley Industries, supra,* does not lay down a different rule. It merely holds that when a new trial is granted because the verdict is against the evidence, an appellate tribunal exercises a closer degree of scrutiny than when the issue is trial error.

As a matter of fact, under the cases cited a new trial was mandatory because the court also improperly charged the jury. Assignments of wages are valid unless made prior to the accrual thereof. Section 601 of Title 46 U.S.C.A. (*infra,* pp. 12-13). The trial court, on the first trial however, refused to so charge (114a-115a). Cf. *The George Wells,* 118 Fed. 761, 762-763 (D.C. Mass. 1902).

Respondent also excepted to the trial court's failure to charge that it was not necessary that to constitute sufficient cause the reason for withholding had to be based on a legal ground. As this court pointed out in *McCrea* v. *United States,* 294 U.S. 23, 30, "without sufficient cause" means something more than the absence of valid defenses. It is sufficient if the refusal to pay is in some degree morally justified, *Collie* v. *Fergusson,* 281 U.S. 52, 56.

See also *The Velma L. Hamlin,* 40 F.2d 852, 854 (4 Cir. 1930); *The Cubadist,* 252 Fed. 658, 662 (D.C. Ala. 1918); *The Thomas Tracy,* 24 F.2d 372, 374 (2 Cir. 1928), cert. den. 277 U.S. 595; *Petterson* v. *United States,* 274 Fed. 1000, 1003 (S.D.N.Y. 1921); *Swain* v. *Isthmian Lines, Inc.,* 360 F.2d 81, 87 (3 Cir. 1966).

A new trial therefore was properly granted.

III

The trial court properly interpreted the applicable law on the second trial.

On the second trial, the trial court did not commit error in permitting respondent to introduce petitioner's admissions that he had not worked at the actual times recorded.

This court as well as other Federal Courts, have been specific that the penalties prescribed by Section 596 of Title 46 U.S. Code do apply except when the monies withheld are wages actually *earned* (Emphasis supplied). In *Isbrandtsen Company, Inc.* v. *Johnson,* 343 U.S. 779, 788, when this court held that no deductions or set-offs for derelictions of duty could be made, except those prescribed by statute, it pointed out that legislation which was enacted for the benefit of seamen looked towards the payment of *earned* wages (Emphasis supplied).

In *Ladzinski* v. *Sperling Steamship & Trading Corp.,* 300 F. Supp. 947 (S.D.N.Y.), the court in an extended opinion reviewed the various statutes dealing with seamen's wages, the cases interpreting them, and the Congressional intent and found that unless the monies claimed represent sums due for *services actually performed,* the penalties prescribed by Section 596 of Title 46 U.S.C.A. cannot be imposed.

In *Lakos* v. *Saliaris,* 116 F.2d 440 (4 Cir. 1940) the court rejected the contention that a war bonus did not constitute wages within the meaning of 46 U.S.C. 596 and 597 and held that because it was compensation for *services actually rendered,* it was in fact and in law a part of the seaman's wages. To the same effect see *Glandzis* v. *Callinicos,* 140 F.2d 111 (2 Cir. 1944) (war bonus) and *Monteiro* v. *Sociedad Maritima San Nicholas, S.A.,* 280 F.2d 568 (2 Cir. 1960) cert. den. 364 U.S. 915 holding that overtime because it is compensation for *services actually rendered,* falls within the definition of 46 U.S.C. 596.

It would, therefore, have been prejudicial error to exclude such testimony.

CONCLUSION

The petition fails to present any important reason for granting a writ. No substantial question is raised, and there is no conflict of decision. Moreover, the questions attempted to be raised are not in accord with the record in this case.

The proceedings below were proper and it is respectfully submitted that this court should deny the petition.

Respectfully submitted,

VICTOR S. CICHANOWICZ,
Attorney for Respondent.

APPENDIX

Rule 54 of the Rules of Civil Procedure, 28 U.S.C.A.

"(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, * * *, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * * only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such a determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Shipping. 46 § 601

§ 601. Attachment or arrestment of wages; support of wife and minor children; State tax laws

No wages due or accruing to any master, seaman, or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a master, seaman, or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen, employed on fishing vessels as well as to seamen: *Provided*, That nothing contained in this or any preceding section shall interfere with

the order by any court regarding the payment by any master or seaman of any part of his wages for the support and maintenance of his wife and minor children: *And provided further,* That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them.

As amended Sept. 14, 1959, Pub.L. 86-263, 73 Stat. 551; Apr. 25, 1968, Pub.L. 90-293, § 1(d), 82 Stat. 108.

Plaintiff's Exhibit 4.

June 16, 1967

Hudson Water Ways Corp.
Chase Manhattan Plaza
New York, N.Y.

Re: LEWIS v. TRANS ORLEANS

Gentlemen:

This is to advise you that we have been retained by the above named REGINALD LEWIS to prosecute his claim against the above named vessel and persons responsible therefore for damages and injuries sustained during the course of employment aboard the said vessel, and for wages due and for liquidated damages pursuant to provisions of 46 USCA section 596, and 597 by reason of the withholding of wages from him.

Very truly yours,

LEBOVICI AND SAFIR

By: .....
Herbert Lebovici

HL:ek

Except to Charge.

January 24, 1972

Before: Hon. Dudley B. Bonsal, District Judge, and a jury.

(Exceptions to the Court's charge.)

Mr. Cichanowicz: Also, on the wage case, to constitute sufficient cause it is not necessary that the reason for withholding must be some legal ground.

The Court: I didn't say anything about legal ground. I think I covered the contentions with respect to that and whether they thought it was unreasonable.